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# THE POWER OF CONGRESS TO ENACT INCORPORATION LAWS AND TO REGULATE CORPORATIONS.

## I. THE POWER OF CONGRESS TO ENACT INCORPORATION LAWS.

THE formation of corporations is not a primary purpose or power of the national government. Corporations are not mentioned in the Constitution. But, subject to the limitations expressly imposed by the Constitution, Congress has power to enact laws to execute any of the purposes or powers entrusted by the Constitution to the national government; and, therefore, Congress can pass an act of incorporation, or an act regulating corporations, if such an act is merely a means of executing some constitutional purpose or power.

In 1791 the first Congress passed a bill incorporating the Bank of the United States, a private stock corporation with power to establish branches and to engage in a general banking business. President Washington called upon Thomas Jefferson, the Secretary of State, and Edmund Randolph, the Attorney-General, for opinions as to the constitutionality of the bill. Their opinions being adverse, the President called upon Alexander Hamilton, who was Secretary of the Treasury and had been the principal author of the bill, to state the reasons which induced him to consider the bill constitutional. Hamilton submitted a persuasive

opinion in favor of the constitutionality of the bill,[1] which thereupon was signed by the President. The charter of the bank expired in 1811 and for political reasons Congress refused to renew it; but in 1816 Congress passed an act chartering the second Bank of the United States, which also was a private stock corporation with power to establish branches and to engage in a general banking business throughout the United States. The United States was a shareholder in the bank, and the latter was constituted a depositary of the United States government. In the case of M'Culloch *v.* Maryland[2] the Supreme Court decided that the act incorporating the bank was constitutional because the creation of such a banking corporation was an appropriate instrument for conducting the fiscal operations of the government. The court held that the creation of a corporation was not a substantive and independent governmental purpose, but was merely a means employed to effect some ulterior purpose; that, except so far as expressly limited by the Constitution, Congress was impliedly empowered to resort to any appropriate means of effecting any of the constitutional purposes of the national government; that it was not a subject of controversy that the creation of a banking corporation was a convenient, useful, and essential means for carrying on the fiscal operations of the government, and that there was no reason why Congress should not resort to the creation of a corporation for that purpose.[3]

In 1863 and 1864 Congress passed general acts for the incorporation of national banks. In Farmers' and Merchants' National Bank *v.* Dearing[4] the Supreme Court said:

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in M'Culloch *v.* Maryland (4 Wheat. 316) and in Osborn *v.* Bank of the United States (9 *id.* 708) therefore applies. The national banks organized under the act are instruments designed to be used

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[1] Hamilton's opinion is printed in the edition of The Federalist edited by Paul Leicester Ford, published by Henry Holt & Co. in 1898.

[2] 4 Wheat. (U. S.) 316 (1819). See also Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738, 859 (1824).

[3] See the opinion of Chief Justice Marshall, 4 Wheat. (U. S.) 411, 422, 423 (1819).

[4] 91 U. S. 29 (1875).

to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge."

Although undoubtedly the court was right in sustaining the constitutionality of the National Bank Act, the grounds upon which the court based its conclusion seem questionable. The act incorporating the Bank of the United States was sustained because it was created to serve as an instrument of the government in carrying on its fiscal operations; but the constitutionality of a general act for the incorporation of an unlimited number of banks to engage in a general banking business for the profit of their stockholders cannot fairly be based on that ground.[5] Under the National Bank Act more than seven thousand banks have been formed, many of them having a capital of only $25,000 and supplying only local needs of banking facilities. An assertion that all these banks were incorporated to serve as instruments of the government in the administration of its fiscal operations would seem little more than a pretense. A sounder and better ground for sustaining the constitutionality of the National Bank Acts appears to be the power conferred by the Constitution upon Congress "to regulate commerce with foreign nations, and among the several states." Even in 1791, when the commerce of the United States was in its infancy, Alexander Hamilton assigned the commerce clause of the Constitution as a ground for sustaining the constitutionality of the act incorporating the first Bank of the United States. In modern times a sound banking system and adequate banking facilities are as essential to interstate and international commerce as are railways and steamship lines.

[5] In Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738, 860 (1824), Chief Justice Marshall said: "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of M'Culloch *v.* The State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

In the case of California *v.* Pacific Railroad Companies [6] the Supreme Court sustained the constitutionality of the acts of Congress incorporating the Pacific Railroad Companies. Mr. Justice Bradley, delivering the opinion of the court, said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce." [7]

In Luxton *v.* North River Bridge Co.[8] the Supreme Court sustained the constitutionality of the act of Congress incorporating the North River Bridge Company for the construction of a bridge across the Hudson River between the states of New York and New Jersey. The court held that

"although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water." [9]

Congress possesses all sovereign powers of government in the territories of the United States, and may establish territorial governments with general legislative powers. Therefore Congress has power to pass special or general laws authorizing the formation of corporations for any purposes within the territories, and this power may be delegated to the respective territorial legislatures.[10] Congress also may charter corporations in the

[6] 127 U. S. 1 (1887).

[7] 127 U. S. 39 (1887). Congress also has granted a charter to the Nicaragua Canal Company.

[8] 153 U. S. 525 (1894). [9] 153 U. S. 525, 530 (1894).

[10] Mormon Church *v.* United States, 136 U. S. 1, 42 (1889), and cases cited; Vincennes University *v.* Indiana, 14 How. (U. S.) 270 (1852); Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539 (1831) and cases cited.

District of Columbia.[11] However, the franchises of a territorial corporation do not extend beyond the territory in which it was incorporated, and the franchises of a corporation chartered by Congress under its legislative powers over the District of Columbia do not extend beyond the District. Such corporations may carry on their authorized business and operations in the several states only so far as permitted by the states.

## II. National Incorporation of Trading Companies.

The grant by the Constitution of power "to regulate" interstate and international commerce has been construed by the Supreme Court as constituting, in effect, a grant of power to legislate generally in respect of such commerce. It has been held that Congress not only has power to regulate interstate and international commercial transactions and to prescribe police regulations for the government of interstate and international commerce,[12] but also has power to pass laws prohibiting restraints of such commerce,[13] and laws to provide the public with suitable instrumentalities or facilities for the transaction of such commerce, such as railways, bridges, and telegraph lines,[14] as well as laws regulating the business and operations of public carriers and of others engaged in a business of a public character and serving the public as instrumentalities for the transaction of such commerce.[15]

Soon after the adoption of the Constitution, when the interstate and international commerce of the United States was comparatively small, Hamilton pointed out that "the fact that all the principal commercial nations have made use of trading corporations is a satisfactory proof that the establishment of them is an incident to the regulation of commerce." [16] In modern times a

[11] Hadley *v.* Freedman's Savings Bank, 2 Tenn. Ch. 122, 126 (1874); Williams *v.* Creswell, 51 Miss. 817, 822 (1876).

[12] Lottery Case, or Champion *v.* Ames, 188 U. S. 321 (1902); Reid *v.* Colorado, 187 U. S. 137 (1902); *In re* Rahrer, 140 U. S. 545 (1890).

[13] For example, the Anti-Trust Act of 1890. [14] Cases *supra.*

[15] Compare the Interstate Commerce Act, approved February 4, 1887, and its various amendments; the "Elkins Act," approved February 19, 1903; the Act to promote the safety of employees and travellers upon railroads, approved March 2, 1903, and the Employers' Liability Act, approved April 5, 1910.

[16] Hamilton's opinion as to the constitutionality of the Bank of the United States, Ford's edition of The Federalist, page 677.

very large part of interstate and international trade is carried on by means of corporate organizations and the right to form corporations to carry on such trade has become a practical necessity. An act of Congress authorizing the formation of such corporations could, therefore, justly be sustained on the ground that the right to form corporations is necessary to the convenient and effective transaction of interstate and international trade.

If the several states should refuse or fail to provide adequate facilities for the formation of corporations to engage in interstate and international trade, the need of national legislation would become obvious; but the fact that the several states have enacted laws authorizing the formation of corporations to engage in interstate and international trade would not impair or limit the power of Congress to enact such laws, if Congress could exercise this power in the absence of all state legislation. On the contrary, the diversity of the corporation laws of the several states; the practice which has grown up of forming corporations under the laws of certain states for the purpose of carrying on business principally, or wholly, in other states; the attempts of some of the states to increase their income from corporation fees and taxes, by inviting the formation of corporations under laws conferring wide powers and containing few restrictive regulations for the protection of the public; and the policy adopted by other states of imposing burdensome restrictions upon foreign corporations; — all would furnish additional grounds for national legislation authorizing the formation of interstate trading corporations governed by uniform regulations with respect to their organization, their powers, and their management, and vested by Congress with the right to carry on their business throughout the United States.

In his opinion on the constitutionality of the charter of the first Bank of the United States, Hamilton said:

"It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends

of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.

"A strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great independent substantive thing; as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or mean to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association, to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience." [17]

## III. Franchises of National Corporations.

Power in Congress to pass a national incorporation law implies power, (*a*) to confer upon a corporation formed under the law the legal right or franchise to act in a corporate capacity in carrying on its business and operations throughout the United States, without regard to state lines, and (*b*) to prescribe the method of organizing the corporation, to define the terms and effect of the charter contract among the shareholders, and to regulate the internal affairs of the corporation, including the rights and obligations of its shareholders and the method of winding up its affairs in case of dissolution or insolvency.

Whether Congress can confer upon a corporation special rights or franchises, in addition to the right to act in a corporate capacity, depends upon the purposes of the corporation and the nature of

[17] Ford's edition of The Federalist, page 657. See also the opinion of Chief Justice Marshall in M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 411, 421 (1819).

the special rights. The constitutionality of such a grant of special rights could not be based on the ground that the corporation was formed under an act of Congress. Congress could grant special rights to a national corporation only if it could constitutionally grant such special rights to an unincorporated association or to a state corporation for similar purposes. Thus, if the purpose of a national corporation or of a state corporation is to build a railroad or bridge to serve the public as an instrument of interstate commerce, Congress may confer upon it the right to condemn property for that purpose and may confer all powers necessary to enable the corporation to establish and operate its railroad or bridge. If the purpose is to serve the national government as an instrument for carrying on some governmental function or activity, Congress may confer upon the corporation all powers necessary for the performance of this function or activity throughout the United States.[18]

The act of Congress incorporating the second Bank of the United States conferred upon the bank the right to engage in a general private banking business throughout the United States, and the constitutionality of the grant of this right was sustained on the ground that the bank could not serve the national purpose for which it was established unless authorized to engage in a general banking business.[19] The same rule was applied to the provisions of the National Bank Act under which numerous banks have been organized to carry on a general banking business for the profit of their shareholders. Similarly, the constitutionality of the acts incorporating the Pacific Railroad Companies was sustained although these companies were authorized to engage in intrastate as well as interstate transportation and to carry on their business and operations like other railroad companies in the several states. These powers were necessary to enable these corporations to accomplish the national purposes for which they were established.

Assuming that Congress has constitutional power to enact a law for the incorporation of companies to engage in interstate or international trade, a question may arise whether Congress could authorize such companies to engage incidentally in intrastate

[18] See the opinion of Chief Justice Marshall in Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 861, 862 (1824). See Thomson *v.* Union Pacific R. Co., 9 Wall. (U. S.) 579 (1869).

[19] Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 739 (1824).

commerce, or to carry on a general trading business, including not only interstate or international trade but also intrastate trade. The argument in favor of the constitutionality of such a law would not be as strong as the argument in favor of the constitutionality of a law for the incorporation of a bank to serve as fiscal agent of the government, with power to engage in a general banking business, or of a law for the incorporation of a railway company to furnish a highway of interstate commerce, with power to engage in a general railroad business. It may, however, be urged with much force that authority to engage in trade generally, including intrastate trade, is a practical necessity to enable a corporation to serve as a means or facility for the transaction of interstate and international commerce. Commerce is not governed by state lines, and the business of a partnership or of a corporation rarely consists wholly of interstate or international commerce, or wholly of intrastate commerce. To authorize the formation of a trading corporation or copartnership with no power to engage in any commerce except interstate and international commerce would be useless. If Congress cannot authorize the formation of corporations to engage in interstate and international commerce with incidental power to engage in trade generally, the right to use a corporate organization as a means of carrying on interstate and international commerce would depend wholly upon the laws of the several states, though the national government alone has constitutional power to control and to regulate such commerce.

## IV. National Legislation relating to National Corporations.

Power in Congress to pass an act of incorporation does not include power to legislate generally concerning the legality of the transactions of a corporation formed under the act, or concerning its property rights, contracts, and liabilities in the several states. Such general legislation, though embodied in the act of incorporation, could not be sustained as a regulation for the government of the corporation, or as a limitation of its corporate powers.

Of course Congress can regulate the transactions of national corporations to the same extent as the transactions of state corporations or of individuals. Thus Congress can regulate their

interstate and international commerce; and the business of a corporation operating a highway of interstate commerce or acting as a public interstate carrier is subject to regulation by Congress whether the corporation was formed under an act of Congress or under a state law. Furthermore, if a corporation should be used by the national government as a means of executing any of its constitutional purposes or powers, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to secure the execution of the governmental purpose or power. Thus if Congress should use a corporation as a means of providing a highway, or a railway line, or other transportation facilities for the interstate commerce of the people, or for the postal and military operations of the government, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to attain these governmental purposes in a safe and effective manner.[20] Similarly, Congress can legislate concerning the acts and dealings of national banks so far as may be needed to effect the national purposes served by them.[21] However, the constitutionality of such legislation would not be based on the ground that the corporations to which it applies were formed under an act of Congress. It would be based wholly upon the character of the business or transactions to which the legislation relates, or upon the fact that the corporations were employed by the government as instrumentalities to execute some constitutional purpose or power of the government. Congress could enact such legislation applicable to individuals or to state corporations under like conditions.[22]

If Congress should pass a law for the incorporation of private trading companies to engage in interstate or international trade, Congress would have the sole power to regulate their interstate or

[20] Compare the Acts relating to the Pacific Railroad Companies, the Interstate Commerce Acts, the Safety Appliance Acts and the Employers' Liability Acts; and see the Second Employers' Liability Cases, 223 U. S. 1 (1912) and cases cited. It should be observed that the power of Congress to pass such legislation applicable to railway lines used in the postal and military operations of the Government would not depend upon the fact that the lines were interstate lines or were used in the transaction of interstate commerce.

[21] See Farmers', etc. Bank *v.* Dearing, 91 U. S. 29 (1875); Davis *v.* Elmira Savings Bank, 161 U. S. 275 (1896).

[22] See the opinion of Chief Justice Marshall in Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 862–864 (1824).

international commerce, to limit their corporate purposes and powers, and to regulate their management and internal affairs, but their intrastate commerce, and their property rights, contracts, and liabilities in the several states could not be regulated by Congress and would be governed by the laws of the states.

## V. State Laws Affecting National Corporations.

The rule that the operation of a constitutional law enacted by Congress cannot be controlled or limited by state legislation applies to national acts of incorporation. Thus a state cannot by law interfere with the operation of the provisions of the National Bank Act relating to usurious transactions of national banks,[23] or to the winding up of national banks and distribution of their assets in case of insolvency.[24] Similarly a state cannot by law prohibit a national bank from receiving deposits when insolvent and impose a penalty upon the officers of a bank violating the prohibition.[25] It is clear also that the states cannot constitutionally defeat the purpose or impair the efficiency of a corporation established under authority of a national law as an instrumentality or agency of the national government, even though no express provision of the national law be infringed.[26] However, subject to the limitations above stated, national corporations are subject to the operation of the general laws of the several states. In First National Bank *v.* Kentucky [27] Mr. Justice Miller used the following language:

"They [national banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

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[23] Farmers', etc. Bank *v.* Dearing, 91 U. S. 29 (1875).

[24] Davis *v.* Elmira Savings Bank, 161 U. S. 275 (1896). See also Rankin *v.* Barton, 199 U. S. 228 (1905).

[25] Easton *v.* Iowa, 188 U. S. 220 (1903).

[26] See M'Culloch *v.* Maryland and Osborn *v.* Bank of United States, *supra.*

[27] 9 Wall. (U. S.) 353 (1869). See also Railroad Co. *v.* Peniston, 18 Wall. (U. S.) 5.

## VI. State Taxation of National Corporations.

Congress may exempt from state taxation the business and operations of a national corporation serving the government as an instrument in the execution of some governmental purpose or power, or serving the public as an instrument of interstate or international commerce, and it seems that Congress also may exempt from state taxation any property held and used by such a corporation in the service of the government or of the public. The power of Congress to exempt the business or property of such a corporation from state taxation would not be based upon the corporate character of the organization or upon the fact that the corporation was chartered by Congress, but it would be based upon the purposes of the corporation and the governmental or public uses to which its property was devoted. Congress could grant such an exemption to a national corporation only if it could constitutionally grant a similar exemption to state corporations or to individuals under similar circumstances.[28]

In the absence of an express exemption from state taxation, the rule appears to be as follows: The right or franchise to carry on the business or operations of a corporation formed by authority of the national government to serve as a governmental agency or to serve the public as an instrument of interstate or international commerce cannot be taxed by the states, but the property of the corporation may be taxed by the states in the same manner as the property of individuals and state corporations, provided that the governmental or public purposes of the corporation be not impaired. If, however, a corporation was not formed to serve as an agency of the government or to serve a public use, but was formed merely to serve its shareholders as a means of carrying on interstate or international trade for private profit, the corporation and its transactions would be subject to taxation and to other state legislation to the same extent as individuals and unincorporated companies engaged in a similar business. Only the interstate and international commerce of such a corporation and its right or franchise to be a corporation and to act in a corporate capacity would be exempt from state taxation.

[28] *Cf.* Thomson *v.* Railroad Co., 9 Wall. (U. S.) 579 (1869); Railroad Co. *v.* Peniston, 18 Wall. (U. S.) 5 (1873).

In M'Culloch *v.* Maryland [29] the Supreme Court decided that a statute of the state of Maryland prohibiting the Bank of the United States from issuing notes within the state except upon payment of a tax to the state and imposing a penalty upon officers of the bank violating this prohibition was unconstitutional, because it was a tax on the operations of the bank and consequently on the operations of an instrument employed by the government of the Union to carry its powers into execution. But the court pointed out that a state could impose a tax on the real property of the bank in common with other real property within the state, or a tax upon the interest of citizens of the state in the bank in common with other property of the same description throughout the state.[30]

Similarly, in cases involving the constitutionality of state taxes imposed upon railroad companies authorized by Congress to build and maintain interstate lines of railway the Supreme Court held that a state could not constitutionally tax the franchise or right to carry on their operations conferred upon these companies by the United States, whether the companies were incorporated under the laws of the United States or under state laws,[31] but that a state could tax the property of these companies equally with other property within its jurisdiction.[32]

## VII. National Control and Regulation of State Corporations.

Congress has power to regulate the interstate and international commerce of state corporations to the same extent as that of

[29] 4 Wheat. (U. S.) 316 (1819).

[30] 4 Wheat. (U. S.) 436 (1819). In Osborn *v.* Bank of the United States, the court held that a tax imposed by the state of Ohio upon the bank for each office of discount and deposit maintained by it within the state was unconstitutional because a tax upon the business or franchise of the bank.

The power of the states to tax the property of national banks and the shares of their stockholders is regulated by the National Bank Act. (U. S. Rev. Stat., Sec. 5219.) See Covington *v.* First Nat. Bank, 198 U. S. 100 (1904); Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664 (1899); Van Slyke *v.* Wisconsin, 154 U. S. 581 (1871); Aberdeen Nat. Bank *v.* Chehalis County, 166 U. S. 440 (1897); National Bank *v.* Commonwealth, 9 Wall. (U. S.) 353 (1869).

[31] California *v.* Pacific Railroad Co., 127 U. S. 1, 40 *et seq.* (1887).

[32] Thomson *v.* Union Pacific R. Co., Eastern Division, 9 Wall. (U. S.) 579 (1869); Union Pacific R. Co. *v.* Peniston, 18 Wall. (U. S.) 5 (1873). See also Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 531 (1888).

partnerships and of individuals, and there appears to be no constitutional reason why Congress should not enact regulations applicable only to the commerce of corporations.

A plan has been suggested of regulating state corporations engaged in interstate or international commerce by an act of Congress prohibiting them from engaging in such commerce, except upon obtaining from some government official a license to be issued only upon compliance with prescribed regulations with respect to the issue of their stocks and bonds, the conduct of their business and the management of their internal affairs. Against the constitutionality of such legislation it may be urged that the right of corporations, as well as of partnerships and individuals, to engage in interstate and international commerce is not derived from the national government and does not exist merely by grace or license of that government; that the Constitution does not confer upon Congress power to prohibit interstate or international commerce, but only confers power to regulate it; that the power of regulation extends only to acts done in carrying on commerce and to matters connected directly with the transaction of commerce;[33] and that the organization, powers, and internal affairs of trading corporations are not directly connected with the transaction of commerce, but bear only a remote relation thereto.

Strong arguments, however, can be advanced in support of the constitutionality of such legislation. No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce. The organization, powers, and financial condition of a trading corporation may have a direct and important relation to the transaction of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. A statute prohibiting the transaction of interstate commerce by means of a corporate organization which is a menace

[33] Thus although the products of agriculture and of manufacturing may become important objects of trade and commerce, Congress cannot on that account regulate agriculture or the business of manufacturing. Agriculture and manufacturing are not in themselves commerce or any part of commerce, and they have no direct connection with the transaction of commerce.

to the security of the public would seem justifiable as an exercise of the police power over interstate commerce and as a regulation of such commerce within the meaning of the Constitution. Furthermore, if interstate and international commerce cannot be carried on in an orderly manner and with safety to the public by a multitude of corporations organized under the diverse and varying legislation of forty-eight different states and subject in each state to special regulations and restrictions, it would seem justifiable, under the power to regulate interstate and international commerce, to require all corporations engaging in such commerce to comply with any appropriate regulations for the protection of the public and also to confer upon all corporations complying with the prescribed regulations a legal right or franchise to carry on their interstate and international commerce throughout the United States, free from restrictions imposed by the several states.

Congress has power to require corporations and other associations engaged in interstate or international commerce to file reports as to their organization, powers, and financial condition.[34] Congress also may provide for the appointment of officers and commissions to act as police of interstate commerce and to administer and enforce all constitutional regulations prescribed by law.[35] Congress, therefore, may vest in a national commission or in some public officer all necessary powers for the enforcement of any constitutional regulations enacted by Congress with respect to trading corporations engaged in interstate or international commerce. Such a commission or public officer may be required by law to issue to every corporation that shall have complied with the prescribed regulations a certificate of such compliance in the form of a license; and there seems to be no good reason why such certificates should not be made *primâ facie* evidence of compliance with the prescribed regulations, or why corporations should not be prohibited from engaging in interstate or international commerce until they shall have obtained such certificates.

The power of Congress to enact such legislation would not be based upon the theory that the right to transact interstate and

[34] See the Interstate Commerce Act of February 4, 1887, with its amendments, and the Act of February 14, 1903, establishing the Department of Commerce and Labor and providing for the appointment of a Commissioner of Corporations.

[35] See the Interstate Commerce Act of February 4, 1887, and its amendments.

international commerce through a corporate organization was derived from Congress or was conferred by national license, or upon the theory that Congress has power to regulate the organization, powers, or management of state corporations. It would be based upon the theory that a corporate organization is but a means of transacting commerce, and that under its power to regulate interstate and international commerce Congress can prohibit the transaction of such commerce by means of any corporate organization which in its opinion is unsafe or otherwise prejudicial to the interstate commerce of the public.

An attempt on the part of Congress to control or regulate state corporations by means of the imposition of prohibitory excise taxes should not be countenanced. It has been asserted that a legislature may use its taxing power not only as a means of raising revenue, but also as a means of securing by indirection results which the legislature could not constitutionally attain by direct legislation; and in support of this assertion reference has been made to the *dictum* of Chief Justice Marshall that "the power to tax involves the power to destroy." [36] This *dictum*, like other striking phrases of that great jurist, has sometimes been quoted without reference to its context and in support of doctrines which it does not justify. The statement that "the power to tax involves the power to destroy" was made in support of the conclusion that a state could *not* tax the operations of an instrument of the national government and thus control its constitutional measures; but Chief Justice Marshall certainly did not mean to imply that the taxing power could constitutionally be used as a pretext for the accomplishment of an unconstitutional object. That this was not his meaning is apparent from his statement in the same case that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." Undoubtedly, the courts would not be justified in scrutinizing the reasonableness of a tax, or the wisdom or motive of Congress in imposing it; but if it should appear plainly that a law nominally imposing a tax was not really a

[36] M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431 (1819).

revenue measure, but in fact was an act of confiscation, or a mere pretext for the accomplishment of some purpose not warranted by the Constitution, the Supreme Court could not sustain such a law without abdicating its highest function and permitting the practical nullification of the Constitution itself.[37]

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[37] See, however, the opinion of Mr. Justice White in McCray *v.* United States, 195 U. S. 27 (1903). In this case the Supreme Court refused to declare unconstitutional a tax on the manufacture of artificially colored oleomargarine, though the tax obviously was not a revenue measure, and held that the right to manufacture artificially colored oleomargarine was not protected by the Constitution. The decision of the Supreme Court in Veazie *v.* Fenno, 8 Wall. (U. S.) 533 (1869) that the imposition by Congress of a prohibitory tax upon state bank notes was constitutional may be sustained on the ground that Congress could absolutely prohibit the issue of such bank notes as a necessary incident to the creation of the national banking and currency system.